91-1535

No. _____

Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

JOHN BASH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether prejudicial error was committed when (i) written material alleged by Defendant to form the basis of his conclusion that his actions were not illegal were not admitted into evidence, and (ii) Defendant was not allowed to testify with respect to any of the excluded materials?

2. Whether the District Court's failure to instruct the jury to apply a subjective standard in determining whether the Defendant had a good-faith belief that his actions were legal constituted prejudicial error?

3. Whether incorrect advice to a single taxpayer with respect to a single deduction can form the basis for more than one felony conviction under the provisions of 26 U.S.C. §7206(2)?

4. Whether a conviction for aiding and abetting the filing of false tax returns for 1981 and subsequent years is proper where incorrect advice was given only with respect to the 1980 income tax returns?

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JOHN BASH,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, JOHN BASH, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding

on October 30, 1991. A Petition for Rehearing was denied on December 24, 1991.

OPINION BELOW

The opinion of the Court of Appeals is attached hereto as **APPENDIX A.** The order denying Defendant's Petition for Rehearing is attached hereto as **APPENDIX B.**

JURISDICTION

The statutory basis for the jurisdiction of the United States District Court for the Southern District of California was based upon 18 U.S.C. §3231. Jurisdiction of the

Court of Appeals for the Ninth Circuit was based upon 28 U.S.C. §1291. The statutory basis for the jurisdiction of the United States Supreme Court is based upon 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On May 5, 1990, the defendant, JOHN BASH, was convicted on sixty-five (65) counts of tax-related offenses, including:

Count 1 -- Conspiracy to defraud the United States by impeding the ascertainment, assessment and collection of revenue, in violation of 18 U.S.C. §371;

Counts 2 through 64 -- Aiding and abetting the preparation and presentation of false tax returns, in violation of 26 U.S.C. §7206(2);

Count 65 -- Filing a false tax return in violation of 26 U.S.C. §7206(1), resulting in an understatement of tax liability.

Counts 2 through 51 pertain to investment tax credits claimed by lessees of master recordings on their tax returns for 1981, 1982 and/or 1983 (hereinafter sometimes referred to as the "Master Recording Program"). Counts 52 through 64 relate to improper charitable contributions claimed as deductions by individuals who formed personal churches during 1980 or 1981

(hereinafter sometimes referred to as the "Church Program").

Mr. Bash was sentenced to a term of imprisonment of twelve (12) years, was fined $50,000 with respect to Count One, and was ordered to pay a penalty assessment of $50.00 for each of Counts One through Sixty-Five, for a total penalty of $3,250. He began serving his term of incarceration on December 5, 1990 and continues to serve his sentence at the Lompoc Federal Prison Facility in California.

At all times herein relevant, Mr. Bash resided in San Diego, California. After graduation from high school, he attended Mesa Junior College and San Diego State

University but never obtained a college degree.

At the age of 19, while still a student, Mr. Bash was hired as a salesman by a company named "Sta-Power", a multi-level automotive parts marketing program, and remained with that organization for approximately two-and-one-half (2-1/2) years. After terminating his relationship with Sta-Power, Mr. Bash and a former Sta-Power associate formed a carpet-cleaning business named "American Marketing Service." Subsequently, Mr. Bash and his wife formed another carpet-cleaning business, "Americare Carpet Service".

In 1980, Mr. Bash attended a seminar sponsored by the Freedom

Foundation and Universal Life Church at the request of Thomas Benzing, who had been one of his supervisors at Sta-Power. The speaker at the seminar, attorney William Drexler, promoted the establishment of individual churches. Essentially, the concept was that people would make "tax-deductible" contributions to their personal church and would use some of the church assets to reimburse themselves for "church-related" expenditures.

After attending the seminar, Mr. Bash read books and other materials and attended seminars relating to churches and tax-exempt entities. Thereafter, Mr. Bash and Mr. Benzing formed the Liberty Foundation (which

later changed its name to the Tax Clinic, Inc., also referred to as "TCI"), and established the Church of God. During 1980 (but not thereafter), Mr. Bash and Mr. Benzing put on small seminars, often in people's homes, which explained how to set up a personal church. Materials based on handouts received from the Freedom Foundation and Universal Life Church seminars along with certain sections of the Internal Revenue Code and other legal sources were distributed at these seminars.

Mr. Bash's involvement with the formation of churches ended early in 1981. Each of the substantive church-related offenses set forth in the indictment were based upon tax

returns for 1981 or subsequent years because the six-year statute of limitations barred indictments based on the 1980 tax returns. There is no evidence of any participation by Mr. Bash in the preparation of tax returns forming the basis of the counts relating to the church-related program (Counts 52 through 64).

Mr. Bash first became involved in the master recording lease programs when the Tax Clinic became one (of many) sales representative of an organization called "Entertainment Marketing Company" or "EMC" in the year 1981. Under the EMC program, Investors leased master recordings of original records and claimed investment tax credits based upon the

claimed fair market value of the recordings pursuant to 26 U.S.C. §46(c). This Code section allowed taxpayers to obtain a credit against the liability set forth on their tax return equal to ten percent (10%) of the fair market value of the leased tangible personal property, provided that the lessor exercised an election which passed the tax credit to the lessee. After Messrs. Benzing and Bash's Tax Clinic acted as one of the sales representatives of the EMC program for a period of approximately six (6) months, Mr. Benzing suggested that the Tax Clinic start its own master recording program. An organization called "CFM, Ltd.", a Cayman Islands corporation, was

located to act as the eighty percent (80%) general partner in a newly-formed entity called "American Marketing Company" or "AMC". Mr. Bash and Mr. Benzing became indirect limited partners in American Marketing Company (with a 20% ownership interest) through their newly-formed corporation called "Universal Distributing Corporation" or "UDC." The Tax Clinic also acted as a sales agent for the American Marketing Program.

American Marketing Company essentially copied the master recording program that had been utilized by EMC. The program consisted of American Marketing's contracting for the purchase of

master recordings. Recordings were leased to investor-lessees, who then retained a distributor to market the recordings on a wholesale basis. Under the tax laws in effect at that time, if the lessee had an appropriate profit motive, the lessee was entitled to take an investment credit for the year in which the recording was placed in service based upon ten percent (10%) of the fair market value of the master recording. The investment tax credits claimed by the individual lessees were ultimately disallowed by the Internal Revenue Service based on questions relating to the profit motive of the individual lessees, the value of the

recordings, and the year in which the recordings were placed in service.

Several counts in the indictment (Counts 2-3 and 4-5) related not only to the investment credit taken by the lessee for the year in which the lease was entered into, but also for subsequent years. The subsequent year investment credits were based upon provisions allowing "carryovers" which would be available if all of the allowed investment credit could not be utilized in the initial year.

REASONS FOR GRANTING THE WRIT

1. IN A CASE INVOLVING SPECIFIC-INTENT CRIMES, THE COURT ERRONEOUSLY EXCLUDED EVIDENCE THAT WAS INTRODUCED TO ESTABLISH THE DEFENDANT'S GOOD-FAITH BELIEF IN THE LEGALITY OF HIS ACTIONS, WHICH EXCLUSION WAS INCONSISTENT WITH THE HOLDING OF THIS COURT IN CHEEK v. UNITED STATES, 498 U.S. , 111 S.Ct. 604 (1991).

A. Introduction.

A finding of specific intent was required to convict Mr. Bash of the crimes charged by the indictment. If Mr. Bash was able to establish a good-faith belief that what he was doing was legal, any

finding of willfulness would have been negated. Cheek v. United States, 498 U.S. _____, 111 S.Ct. 604 (1991). The standard of good-faith is a subjective standard based upon the defendant's good-faith belief. Cheek v. United States, supra.

By taking the following actions, the Trial Court deprived Defendant Bash of his right to a jury trial on the issue of willfulness:

(1) The Court excluded the introduction of Exhibits which Bash claimed he read and relied upon as the basis of the tax advice given.

(2) The Trial Court did not allow Bash to testify with respect to the connection between the excluded evidence and the basis of

his belief in the legality of his actions.

B. Exclusion of Evidence.

The District Court denied the admission of the following Exhibits which Mr. Bash claimed that he relied upon:

(1) Oleck: Non-Profit Corporations; Organizations and Associations (Prentice-Hall, 1979), which was not admitted into evidence (Exhibit 101-17).

(2) Hopkins: The Law of Tax-Exempt Organizations (John Wiley & Sons, 1979), which was not admitted into evidence (Exhibit 101-18).

(3) The Universal Life Church Booklet (Exhibit 101-19).

This was a brochure containing an excerpt from the decision in Universal Life Church, Inc. v. United States, 372 F.Supp. 770 (E.D. Cal. 1974) (which was a decision in favor of the Universal Life Church), hereafter referred to as the "Battin Opinion", newspaper articles, Code sections, and additional legal materials pertaining to the status of the Universal Life Church.

(4) Offering material relating to the Audio Leasing Corporation Program (Exhibit 101-20).

(5) American Marketing Company 1992 Master Recording Program (Exhibit 101-22) and American Marketing Sales Kit (Exhibit 101-23), both of which contained excerpts from

the opinion in EMI North American Holdings, Inc. v. United States, 675 F.2d 1968 (9th Cir. 1982), which indicated that the cost of a master recording could entitle the owner to an investment tax credit.

Counsel for the Defendant argued to the Court that the foregoing materials formed the basis of Mr. Bash's claim that he believed his advice relating to the tax consequences of the Church and Master Recording Programs was consistent with the then-existing tax laws.

C. Exclusion of Testimony.

After the Court denied the admission of the foregoing Exhibits, Defendant was not allowed

to testify with respect to the specific content of any of the foregoing items. Prior to allowing any question with respect to the excluded materials, the Court reviewed the materials and would not allow defense counsel to question the Defendant about the substance of the materials and the manner in which such materials formed the basis of Defendant's belief.

D. Prejudicial Error.

Mr. Bash's inability to testify as to his reliance on certain portions of the Exhibits and the failure of the Court to receive the Exhibits into evidence, left the jury unable to determine whether Mr. Bash, in fact, had a good-faith

belief that the programs were legal. It also left the jury unable to determine the extent of the confusion as to the state of the law with respect to programs like the Church Program and the Master Recording Program. Had the jury determined that there was a significant level of uncertainty in the law, they may have been compelled to acquit Mr. Bash on the basis that an individual cannot possess the specific intent to willfully violate a statute where the law in the area in question is unsettled. United States v. Dahlstrom, 713 F.2d 1423 (8th Cir. 1983).

The Supreme Court in Cheek addressed the type of evidence

that the jury would appropriately consider in determining the viability of the proffered good-faith belief defense, and stated:

> "Of course, in deciding whether to credit Cheek's good-faith belief claim, the jury would be free to consider any admissible evidence from any source showing that Cheek was aware of his duty to file a return and to treat wages as income, including evidence showing his awareness of the relevant provisions of the Code or regulations, of court decisions rejecting his interpretation of the tax law, of authoritative rulings of the Internal Revenue Service, or of any contents of the personal income tax return forms and accompanying instructions that made it plain that wages should be returned as income.
>
> "We thus disagree with the Court of Appeals' requirement that the claimed good-faith belief must be objec-

tively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue. Knowledge and belief are characteristically questions for the fact finder, in this case the jury. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it. It would of course be proper to exclude evidence having no relevance or probative value with respect to willfulness; but it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty, and forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." [Citations omitted.] [Emphasis added.]

The decision in Cheek was followed by the Ninth Circuit in United States v. Powell, 936 F.2d 1056 (9th Cir. 1991), amended opinion filed on February 6, 1992, ____ F.2d ____ (9th Cir. 1992). The taxpayer in Powell was convicted at trial for willful failure to file income tax returns in violation of 26 U.S.C. §7203. The taxpayer testified that he and his wife had concluded from their research that filing an income tax return was voluntary, that wages and compensation were different from income, and that they intended to obey the law as they understood it. The District Court allowed the Powells to testify as to their understanding of the law and its

requirements on filing a return, but did not allow the Powells to present the statutes or cases they relied upon in forming their belief. In its initial opinion, the Ninth Circuit held that the District Court's exclusion of the statute had the effect of forbidding the jury to consider evidence that might negate willfulness and that the Court's ruling in this regard constituted prejudicial error. The Ninth Circuit stated that:

> "The general rule that the District Court does not abuse its discretion when it does not allow the defendant to present law to the jury must give way when the defendant's sixth amendment right hinges on admission of the law. Id. The statute upon which the Powells relied to form their belief that the tax

> system did not require them to file an income tax return is relevant to and probative of the issue of willfulness. Thus, the District Court's refusal to permit the Powells to introduce evidence of §6020(b) constituted prejudicial error. We reverse on this ground." 936 F.2d at 1064.

In its amended opinion, the Ninth Circuit declined to rule on whether the exclusion of certain statutes and case law required that the defendant's convictions be reversed because it had already reversed the convictions on the basis that the District Court's instructions did not make it clear that a subjective standard was to be applied in deciding the viability of the Defendant's good-

faith belief defense. However, the Court in effect confirmed its earlier findings. The Ninth Circuit noted, as it had in its original decision, that the Supreme Court in Cheek stated that "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provisions." Furthermore, the Court noted that the District Court ordinarily cannot exclude evidence which is relevant to the jury's determination of what the Defendant believed the law was under §7203 because willfulness is an element of that offense. The Court specifically noted that when prosecuting under §7203, statutes or

case law upon which the defendant claims to have actually relied on are admissible to disprove that he willfully violated the law.

In United States v. Harris, 942 F.2d 1125 (7th Cir. 1991), convictions for willfully failing to file federal income tax returns were reversed where letters offered to prove the defendant's lack of willfulness were excluded because it was perceived that the possible prejudice in the letters exceeded their probative value.

In this case, the District Court erroneously excluded legal materials that Mr. Bash claims he consulted and relied upon, including newspaper articles, legal opin-

ions, statutory and Code sections, books, questions and answer sheets received at seminars, and other materials on many similar church and master recording lease programs which were widely promoted at the time. This exclusion constituted prejudicial error by forbidding the jury to consider evidence that might negate willfulness and thus infringed Mr. Bash's Sixth Amendment rights. Cheek, Harris and Powell mandate that this erroneous evidentiary exclusion result in the reversal of Mr. Bash's conviction.

2. **IN A CASE INVOLVING SPECIFIC-INTENT CRIMES, THE COURT FAILED TO INSTRUCT THE JURY TO APPLY A SUBJECTIVE STANDARD IN DECIDING WHETHER THE DEFENDANT HAD A GOOD-FAITH BELIEF THAT HIS ACTIONS WERE LEGAL.**

At trial, defense counsel proposed that the following instruction be given with respect to Mr. Bash's defense that he had a good-faith belief that his actions in connection with the Church Program and Master Recording Program were legal:

> "The Government must prove beyond a reasonable doubt that Mr. Bash did not act in good-faith belief that his advice and actions were lawful before a verdict of guilty could be retained.

"In this case, failure of the Government to prove a lack of good-faith belief that the income tax returns prepared and presented to the Internal Revenue Service as a result of his counseling, procuring and advising, reported allowable deductions or tax credits of the taxpayer under the Internal Revenue Service Law, Mr. Bash cannot be guilty of willfully aiding and assisting in, and counseling, procuring and advising the preparation and presentation of a false or fraudulent return.

"In determining whether the Government has proved that Mr. Bash did not act in good-faith belief that his acts and advise were lawful you should consider the totality of the circumstances including but not limited to his efforts to research the areas in question and consult with experts, attorneys and accountants, and the actions and statements of attorneys and accountants on the matters charged in the indictment.

"In considering the question of good-faith, you are to use the subjective standard, that is, you are to ask whether the Government has proved that Mr. Bash did not act out of a good-faith belief in the legality of his actions, regardless of your personal feelings about that belief.

Based on instruction given by Judge James A. Redden, United States v. Howell, CR No. 79-15 (D.C. Or. 1980), a case involving alleged false medicare claims.

Based in part on Cooley v. United States, 501 F.2d 1249 (9th Cir. 1974); Devitt and Blackmar, Federal Jury Practice and Instructions, §36.10 (3d ed.)]."

The District Court rejected the foregoing instruction and stated instead:

"And the latter issue, good faith, good faith reliance on the advice of counsel, I instruct you as follow: if the defendant, before

taking any action, sought the advice of counsel, competent counsel, either himself seeking advice or others seeking advice on behalf of entities with which Mr. Bash was involved; if this seeking of advice from competent counsel was done in good faith and for the purpose of securing advice on the lawfulness of his possible future conduct, and if there was made to the attorney who was consulted a full and accurate report of all material facts of which the defendant or the person acting on behalf of the entity had means or knowledge, and if thereafter Mr. Bash acted strictly in accordance with the advice given by the attorney described, then that would mean that he would not be willfully doing wrong and that doing or omitting something which the law forbids or requires as that term is used in these instructions and whether defendant acted in good faith based on good-faith reliance on the advice of an attorney and as to these matters, it is

a factual question which is entirely up to you. And it depends as I have said on whether or not there was full and complete disclosure of the facts to the attorney who was to furnish the advice, and thereafter that the actions taken were strictly in accordance with the advice received.

"Now, secondly, the concepts are really quite pretty much the same. Mr. Bash offered the defense of good-faith belief by Mr. Bash at the time involved of the lawfulness of the two programs which are the subject matter of this indictment, namely, that he believed in good faith that the charitable deduction church program described was lawful. He, also, believed in good faith that the investment tax credit, the master recording program offered, was lawful. If, in fact, you found that he did so believe, then that would be a defense. But I hasten to assure you that with respect to this issue of good-faith belief in the legality of the programs

> and good-faith reliance upon the advice of counsel, are spoken of as a defense but it is not the burden of the defense to prove those issues. It is the burden of the Government where the issue is raised to prove beyond a reasonable doubt that he did not have a good-faith belief in the programs and it is the burden of the Government to prove beyond a reasonable doubt that he did not rely and act in good faith on the advice of counsel."[1]

As indicated above, the Supreme Court in Cheek v. U.S., supra, stated that a subjective standard is to be applied when determining whether a defendant had a

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[1] At trial, the District Court gave counsel for the defense and counsel for the prosecution an automatic exception to the instructions that each side requested be given.

good-faith belief that his actions were legal. While the District Court in this instance did instruct the jury that if it determined that Mr. Bash had a good-faith belief that his participation in the Church Program or Master Recording Program was legal, this would be a defense to the crimes of which he was accused, the District Court erroneously failed to instruct the jury that it was to apply a subjective standard in making this determination. As a result, in deciding whether Mr. Bash had a good-faith belief, the jury may have asked the question of whether they themselves could have reasonably believed, were they in Mr. Bash's shoes, that what they would be doing

with regard to the Church Program and Master Recording Program would be legal. By doing so, they would be applying an objective standard in determining whether or not Mr. Bash had a good-faith belief. Such an approach would be contrary to the holding in Cheek v. U.S., supra. Accordingly, the District Court's failure to inform the jury to consider whether Mr. Bash had a good-faith belief that his actions were legal based upon a subjective standard requires that Mr. Bash's convictions be reversed. This conclusion is further supported by the failure of the District Court to instruct the jury to consider all of the sources consulted by Mr. Bash in

determining whether or not Mr. Bash could have formulated a good-faith belief that his actions were legal.

3. **A DEFENDANT MAY NOT BE GUILTY OF MORE THAN ONE FELONY UNDER 26 U.S.C. §7206(2) (i) FOR ASSISTING ONE TAXPAYER IN THE FORMATION OF A CHURCH, OR (ii) PARTICIPATING IN THE LEASING OF A SINGLE MASTER RECORDING, WHEN THE TAXPAYER FILES SUCCESSIVE ERRONEOUS TAX RETURNS WITHOUT THE PARTICIPATION OF THE DEFENDANT.**

26 U.S.C. §7206(2) provides that any person who willfully aids or abets the preparation of a false tax return or related document "shall be guilty of a felony" (emphasis added). In this case, Defendant Bash was convicted of multiple felonies when

his single act (participation in the formation of a church or participation in an entity that encouraged master recording lessees to take excessive investment tax credits) with respect to a taxpayer led to the taxpayer's filing successive erroneous tax returns. Neither Defendant's counsel nor Government counsel (in the briefs filed with the Court of Appeals for the Ninth Circuit and memoranda filed with the Trial Court) have been able to find a case dealing with this issue. The most analogous case, Mattingly v. United States, 924 F.2d 785 (8th Cir. 1991), supports Defendant's contention that an action with respect to one tax return cannot cause the creation of multiple

felonies under 26 U.S.C. §7206(2) when the taxpayer perpetuates the error in subsequent returns without assistance from the Defendant. In Mattingly v. U.S., supra, the Court considered whether civil tax penalties under 26 U.S.C. §6701 may be imposed with respect to both the original and the carryover returns of the same taxpayer for a related understatement. The Appellant in the Mattingly case was a tax preparer who sold master recording audiotape and videotape tax shelters to his clients. The investments generated investment tax credits based on the master recording's appraised value and/or the sales price agreed to by a friendly buyer and seller (with

payment in long-term unsecured or under-secured promissory notes). The Internal Revenue Service determined that the tapes were greatly over-valued and disallowed the credits. The District Court determined that the civil penalties were assessable, not only for the forty-six (46) 1983 tax returns prepared by Mattingly, but also for the eight (8) returns he prepared for later years that claimed investment credits which originated in 1983.

26 U.S.C. §6701(b) contains a provision that if any person is subject to a penalty with respect to any document relating to any taxpayer for any taxable period (or event), such person shall not be subject to a

penalty under subsection (a) with respect to any other document relating to such taxpayer for such taxable period (or event). The Court noted that the provision clearly states that separate penalties may be imposed for violations involving different taxpayers in the same year and that separate penalties may not be imposed for multiple documents in the same year involving the same taxpayer. What was not clear was whether the "relating to" language applied only to such taxpayer for the first taxable period or event.

The Eighth Circuit noted that there were no other Circuit or District Court opinions that addressed this specific issue and

thus considered it a question of first impression. The Court affirmed the finding of liability for penalties in the original tax period, but reversed the penalties imposed for carryover returns. In Mr. Bash's case where criminal (not civil) penalties are involved, even a stricter notice should be required to insure due process. The word "a" felony in 26 U.S.C. §7206(2) must be strictly applied. There is nothing in the statute that intimates that a single act with a single taxpayer can constitute multiple felonies as future tax returns are filed without the counseling or participation of the defendant. Accordingly, for the foregoing reasons, the Defendant's

convictions with respect to Counts 3, 5, 55, 56, 58-62, 64 should be reversed. (Each of these Counts relates to a taxpayer who carried over advice given in a previous year. The application of the advice by the taxpayer when originally received also led to a conviction.)

4. **DEFENDANT'S ACTIONS LEADING TO THE FORMATION OF CHURCHES IN 1980 ARE NOT SUFFICIENTLY CONNECTED TO TAX RETURNS FILED FOR THE 1981 AND SUBSEQUENT TAX YEARS TO SUPPORT CONVICTIONS FOR AIDING AND ABETTING THE FILING OF FALSE TAX RETURNS.**

Counts 52 through 64 all dealt with 26 U.S.C. §7206(2), which provides, in part, that any person who willfully aids or abets the

preparation of a false tax return or related document "shall be guilty of a felony". Each of the church offenses (Counts 52 through 64) were based upon churches formed during 1980. There is no evidence that Mr. Bash discussed taxable income or deductions with respect to church matters with any of the persons named in Counts 52 through 64 at any time after the end of 1980.

The formation of a church in 1980 and tax deductions taken after the close of the 1981 tax year (i.e., more than fifteen (15) months after formation) are too remote to support a conviction under 26 U.S.C. §7206(2). The remoteness is emphasized by the rapid development of tax

law which included passage of the Economic Tax Recovery Act of 1981, the Tax Equity and Fiscal Responsibility Act of 1982, the Tax Reform Act of 1984, and numerous Court decisions rejecting the tax-exempt nature of private churches. These and other developments in the tax law placed each taxpayer on notice that the availability of all deductions and exemptions should be reviewed by a competent tax advisor prior to filing a tax return. See, e.g., Rager v. CIR, 775 F.2d 1081 (9th Cir. 1985), and Ledbetter v. CIR, 792 F.2d 1015 (9th Cir. 1984) (both citing earlier Tax Court memoranda decisions and denying claimed deductions to purportedly

exempt church organizations) See also, Riemers v. CIR, 42 T.C.M. 838 (1981) (petitioners neither substantiated claimed contributions nor proved Valhalla Universal Life Church was an exempt organization); Kellerman v. CIR, 42 T.C.M. 1508 (1981) (same re: Universal Life Church of Snow); Hall v. CIR, 44 T.C.M. 151 (1982) (same re: Church of Brotherhood; even though claimed to be integral part of the Universal Life Church, Inc., which was held to be exempt in the landmark 1974 Universal Life Church case, this was found not to be a group exemption); Magin v. CIR, 44 T.C.M. 397 (1982) (same re: Maginotic Chamber of the Universal Life Church; not a group

exemption -- must determine status separately). Accordingly, for the foregoing reasons, the Defendant's convictions with respect to Counts 52 through 64 should be reversed.

CONCLUSION

The erroneous evidentiary rulings by the District Court resulted in the inability of Mr. Bash to testify with respect to portions of the material which he relied upon as the basis for his belief that his activities in the Church Program and Master Recording Program were legal. Therefore the jury was prevented from determining whether Mr. Bash had a good-faith belief that his activities

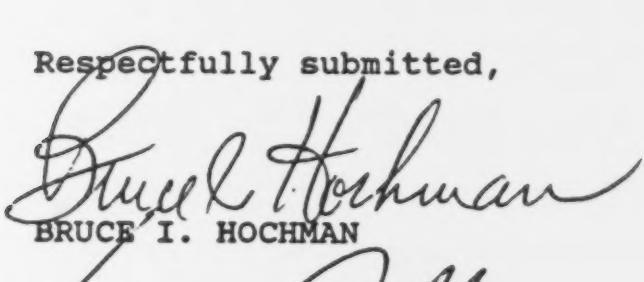
were not in violation of any laws and the Defendant was deprived of his constitutionally-granted right to a jury trial. Furthermore, the District Court's instructions to the jury failed to advise the jury that it was to apply a subjective standard in determining whether Mr. Bash had a good-faith belief that his activities were lawful. Accordingly, relying on Cheek v. United States, United States v. Powell, supra, and Harris v. U.S., supra, the convictions herein must be reversed.

Even if the excluded material and testimony had been allowed and the jury had been instructed to apply a subjective standard, Certiorari should be granted to enable the Court

to review questions of first impression under 26 U.S.C. §7206(2) relating to whether or not a single act of aiding and abetting a given taxpayer can lead to the commission of multiple felonies where the taxpayer, without the advice or counsel of the defendant, continues to perpetuate the error in successive tax returns. It is also respectfully requested that this Court deal with the question of whether or not the counseling of the taxpayer with respect to the tax treatment of an item for one year (for example, 1980), can lead to convictions for aiding and abetting the filing of false returns in subsequent years (i.e., 1981 and later years) where

the Defendant did not counsel the taxpayer or participate in the preparation of the taxpayer's returns with respect to the subsequent years.

Respectfully submitted,



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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 90-50628
	)	
	)	D.C. No.
Plaintiff-Appellee,	)	CR-88-0199-01-B
	)	
v.	)	**MEMORANDUM***
	)	
JOHN BASH,	)	
	)	
Defendant-Appellant.	)	

Appeal from the
United States District Court
for the
Southern District of California
James M. Burns, District Judge,
Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued and Submitted
October 8, 1991
Pasadena, California

Before: SCHROEDER, LEAVY and FERNANDEZ, Circuit Judges

John Bash (Bash) appeals his jury trial convictions on 65 of 67 counts of conspiracy, aiding and abetting the preparation of false tax returns, and making a false statement on a tax return. He was given a sentence of twelve years and ordered to pay a $50,000 fine. We affirm.

DISCUSSION

Bash raises a number of issues on appeal. He contends that the district court erred in excluding from evidence certain exhibits, and erred in refusing to give a proposed instruction. He also contends that

the evidence was insufficient to support conviction, and that he was denied effective assistance of counsel. Finally, he appeals the sentencing order.

A. Exclusion of Legal Material.

The district court permitted Bash to testify about general tax treatises[1] and exhibits containing court opinions[2] but later decided

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1 The treatises were large tomes, one titled "The Law of Tax Exempt Organizations", the other "Nonprofit Corporation, Organizations and Associations".

2 The case reports, which were buried in masses of other materials, were Universal Life Church, Inc. v. United States, 372 F. Supp. 770 (E.D. Cal. 1974),

that the legal treatises and exhibits would not be admitted into evidence. We will reverse an evidentiary ruling only if it is erroneous, and it "would have been more likely than not to affect the verdict." United States v. Emmert, 829 F.2d 805, 808 (9th Cir. 1987).

As a general rule, in a jury trial "the law is given to the jury by the court and not introduced as evidence." Cooley v. United States, 501 F.2d 1249, 1253 (9th Cir. 1974), cert. denied, 419 U.S. 1123, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975). Cheek v.

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a case on church exemptions, and EMI North American Holdings, Inc. v. United States, 675 F.2d 1068 (9th Cir. 1982), a very brief opinion on master recordings.

United States, _____ U.S. _____, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991), seems to create an exception to this rule for good faith belief defenses in tax evasion cases. In dicta the Court stated that "in deciding whether to credit Cheek's good-faith belief claim, the jury would be free to consider any admissible evidence from any source . . . including evidence showing his awareness of the relevant provisions of the Code or regulations, of court decisions, . . . of authoritative rulings of the Internal Revenue Service. . . ." Cheek v. United States, ___ U.S. ___, 111 S.Ct. at 611. It is unclear whether the Court intended the words "evidence showing his awareness" to

include the listed legal materials themselves or only secondary materials -- books, pamphlets, audio recordings -- discussing the law.

United States v. Powell, No. 90-10060 slip op. 7341 (9th Cir. June 13, 1991), resolves this ambiguity in favor of admitting primary materials if they form the basis of a defendant's good faith belief defense. In Powell, the district court excluded from evidence a provision of the tax code upon which appellants claimed to have formed their good faith belief. We found that the district court's ruling constituted prejudicial error. We held that the general proscription against admitting law into evidence

"must give way when the defendant's sixth amendment rights hinge on admission of the law." Powell, slip. op. at 7355.

However, Powell did not hold that an offer of evidence with no probative value triggers the defendant's sixth amendment rights or warrants an exception from the general rule excluding admission of legal materials. In this case, while Bash did refer to the treatises and to brochures containing the cases, he did not testify that the excluded evidence formed the basis of his good faith belief in the legality of his activities. In Powell, on the other hand, the defendants sought to introduce one section of the Internal

Revenue Code which formed virtually the entire basis of their good faith belief defense. Bash's passing reference to the Universal Life church and AMC brochures and the two general tax treatises fails to rise to that level. The usual evidentiary rules of relevance bar admission of amorphous background information which threatens to mislead the jury and cause confusion and delay. Fed. R. Evid. 403. Were we to take Bash's argument to its logical conclusion, a defendant would be permitted to introduce any and all legal materials once perused by the defendant, regardless of their relevance. Moreover, even if a defendant did not testify that he relied on

specifically identified parts of the materials, the whole would be admitted. E.g., the whole of Title 26 of the United Stats Code would be admitted because a defendant said he had once looked at that Title. Or, as here, whole tax treatises would come into evidence because, without specifying the portions, if any, upon which he relied, a defendant says he looked at them. Powell does not require that result.

Had Bash testified that he relied upon specific parts of the materials, admitting them well might have bolstered Bash's credibility by showing that there is some law and legal theory which lends credence to the legality of his tax shelter

schemes. He did not. His testimony did not establish what trial counsel argued for: that Bash relied on those specific materials in forming his good faith belief. Given that, the district court was not required to reject the usual rule of exclusion of legal materials. Cf. Powell, slip. op. at 7355 n.3. Accordingly, the district court did not err.

The other issues Bash raises on appeal are without merit. First, the district court's instruction on good faith was plainly sufficient and adequately covered the issue. See United States v.Cruz, 783 F.2d 1470, 1472 (9th Cir.), cert. denied, 476 U.S. 1174, 106 S.Ct. 2902, 90 L.ed.2d 987 (1986). Second, the evidence was

sufficient to sustain the verdict on all counts, and there was no uncertainty in the law of a magnitude sufficient to make Bash's prosecution improper. Cf. United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983), cert. denied, 466 U.S. 980, 104 S.Ct.2363, 80 L.Ed.2d 835 (1984) (criminal prosecution improper for defendant's "pioneering interpretations" of the tax code); United States v. Russell, 804 F.2d 571, 576 (9th Cir. 1986) (Ferguson, J., concurring). Third, we see no error in the sentence imposed upon Bash, even though it exceeded that imposed upon his partner, Thomas Benzing. The district court clearly articulated valid reasons for the

sentence. Finally, to the extent Bash wishes to question trial counsel's tactics and rely on evidence not introduced at trial, this is not the proper place to raise those issues. Habeas corpus is the proper remedy. United States v. Sanclemente-Bejarano, 861 F.2d 206, 211 (9th Cir. 1988).

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 90-50628
	)	
	)	D.C. No.
Plaintiff-Appellee,	)	CR-88-0199-01-B
	)	
v.	)	**ORDER**
	)	
JOHN BASH,	)	
	)	
Defendant-Appellant.	)	

Before: SCHROEDER, LEAVY and FERNANDEZ, Circuit Judges

The panel has unanimously voted to deny the appellant's petition for rehearing in its entirety.

Without limiting the foregoing, the panel particularly notes that, in its opinion, the record does not

support Bash's contention that the trial court forbad or limited his testimony regarding the legal materials. Rather, the court expressed doubt as to whether an amorphous mass of legal material could be admitted as exhibits.

The petition for rehearing is accordingly DENIED.

Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

No. 91-1535

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN BASH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in declining to admit legal materials into evidence.

2. Whether the district court properly instructed the jury that petitioner's alleged good-faith belief in the lawfulness of his conduct would negate the element of willfulness under the criminal tax laws.

3. Whether petitioner was properly convicted on multiple counts of aiding, assisting, and advising the preparation of false tax returns in successive tax years.

4. Whether there was sufficient evidence that petitioner aided, assisted, and advised the preparation and presentation of the false tax returns involved in Counts 52 through 64.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1535

JOHN BASH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1991. A petition for rehearing was denied on December 24, 1991. Pet. App. B. The petition for a writ of certiorari was filed on March 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 27, 1988, petitioner was charged in a 67-count indictment. Count 1 charged petitioner with conspiring to defraud the United States by taking and causing others to take improper charitable deductions and investment tax credits on individual income tax returns, in violation of 18 U.S.C. 371. Counts 2 through 64 charged petitioner with aiding, assisting, and advising the preparation and presentation of false individual income tax returns to the Internal Revenue Service, in violation of 26 U.S.C. 7206(2). Count 65 charged petitioner with subscribing to a false joint income tax return for the year 1981, in violation of 26 U.S.C. 7206(1). Counts 66 and 67 charged petitioner with failing to file timely income tax returns for the years 1982 and 1983, in violation of 26 U.S.C. 7203.

Following a jury trial, petitioner was convicted on Counts 1 through 65 and acquitted on Counts 66 and 67. He was sentenced to consecutive terms of imprisonment totaling 12 years on Counts 1 through 4. Imposition of sentence was suspended on Counts 5 through 65 in favor of a five-year term of probation to follow his prison term. In addition, the court imposed a fine of $50,000.

2. The evidence at trial established that petitioner and co-conspirator Thomas S. Benzing engaged in various schemes to defraud the United States. The case centered on two schemes, one involving a master recording lease and the other involving charitable church contributions.

In 1980, petitioner and Benzing set up the Tax Clinic, later incorporated as the Tax Clinic, Inc. (TCI), as a financial planning and tax consulting business. They ran a series of advertisements promis-

ing to cut clients' taxes in half. GX 3-5. Holding themselves out as "archbishops" of the "Church of God," which they established, petitioner and Benzing held seminars at which they alternated in presenting information about opportunities designed to lower or eliminate the clients' tax liability. Gov't C.A. Br. 3-4.

TCI clients were counseled that forming a church could substantially reduce their tax liability. After payment of the required fees, the client would be certified as a minister by petitioner and Benzing and would be provided with the necessary documents to form a "church." Clients were advised that they could donate up to 50% of their gross income to the church. GX 8-2. The cash "donations" would be deposited into a church bank account and used to pay the client's personal, nondeductible expenses such as rent, utility bills, and car payments. Petitioner counseled clients that they were not required to perform any religious or charitable activities before charitable deductions could be taken. Gov't C.A. Br. 4-5.

Clients were also counseled to take as a charitable deduction the fee, which ranged from $625 to $2,000, that they paid to petitioner and Benzing's Church of God for assisting in establishing the client's own church. In addition, the clients were directed to pay a $25 monthly fee to the Church of God as an administrative fee to assist them if the legality of the client's church was ever questioned by the IRS. Petitioner also encouraged "donations" to his Church of God with the understanding that some of the money would be returned as "scholarships" or "loans" that would not have to be paid back. GXs 14-1, 14-11, 15-8 to 15-13; Gov't C.A. Br. 5-6, 8-9.

In 1981, petitioner and Benzing embarked on the second scheme charged in the indictment. They ad-

vised TCI clients to purchase a tax shelter from American Marketing Company (AMC), a partnership they controlled. GX 21-1. AMC was formed to sell leases of master recording tapes of children's educational recordings to investors. AMC ordered the title selected by an investor from International Educational Recordings (IER), a company formed by Joseph Gallo, who was solicited by petitioner and Benzing to produce the master recordings. Promotion and distribution were done by a third company, Troubadour Recording and Distributing Corporation (Troubadour). Petitioner and Benzing stated that although it would appear that all three companies were independent, everything would be controlled by TCI. Gov't C.A. Br. 20-21, 24. The master recordings were sold in 1981, 1982, and 1983. Most orders were made through TCI. Investors were advised by petitioner and Benzing that they could purchase a lease of a master recording for a period of eight years, receive an investment tax credit of 10% of the value of the master recording, and also deduct the cost of the lease. GXs 20-1, 20-2; Gov't C.A. Br. 21.

The evidence showed that petitioner's master recording leases did not produce legitimate investment tax credits. It took approximately six to eight weeks to complete a master recording after Gallo received an order from AMC, and no master recordings were in existence at the time a client made a purchase. Most orders for master recordings were made in December and did not satisfy the requirement that an asset be placed "in service" during a given tax year in order to qualify for an investment tax credit for that year. Gov't C.A. Br. 21, 26. In addition, the master recordings were assigned false valuations. For example, a ten-minute record, for which Gallo was paid $800, was valued at $125,000; a 15- or 16-

minute record, for which Gallo was paid $1,200, was valued at $200,000; and a long-playing album, for which Gallo received $2,300, was valued at $475,000. Gov't C.A. Br. 23-24.

Petitioner and Benzing did not make a serious effort to distribute the records. Initially, clients paid Troubadour, which was run by Lester Davis (another acquaintance of petitioner and Benzing), a $1,000 distribution fee. Davis told petitioner and Benzing that he could not assure adequate distribution for $1,000, but they told him they knew what they were doing, that he should make it look as good as possible, and that they would take care of the details. Davis could not begin to distribute records for clients received in 1981 until late in 1982 because he had to wait until Gallo produced the entire 1981 library in record form. During 1982, in accordance with a proposal by petitioner, Troubadour made a sham sale of records to a Cayman Islands company, and Davis informed clients that records from the 1981 program had been sold. Gov't C.A. Br. 24-26.

In addition to advising clients directly at their seminars, petitioner and Benzing referred clients to accountant Rick Henslee, whom they installed in the TCI offices during the 1981 tax season. Henslee prepared the 1980 tax returns of various individuals who claimed charitable contributions to their "churches" and an investment tax credit under the master recording tax shelter; he signed, as preparer, on at least 30 of the returns charged in Counts 2 through 64. Gov't C.A. Br. 7.

3. On appeal, petitioner argued that the district court erred in excluding certain exhibits from evidence and instructing the jury on his good-faith defense, and that the evidence was insufficient to sup-

port his convictions on Counts 2 through 64. The court of appeals rejected those contentions and affirmed petitioner's convictions.

The court noted that although petitioner did refer to excluded treatises and brochures containing certain cases, he did not testify that he relied on specific portions of those materials in forming his alleged good-faith belief in the legality of his activities. Pet. App. A7-A9. In the absence of such testimony, the court held, the legal materials were properly excluded. The court pointed out that Fed. R. Evid. 403 barred the admission of "amorphous background information which threatens to mislead the jury and cause confusion and delay." Pet. App. A8. The court also held that the jury instruction on good faith "was plainly sufficient and adequately covered the issue." *Id.* at A10. Finally, the court found the evidence sufficient to sustain the verdict on all counts. *Id.* at A10-A11.

In its order denying rehearing, the panel "particularly" noted that the record did not support petitioner's contention that the district court "forbad or limited his testimony regarding the legal materials. Rather, the court expressed doubt as to whether an amorphous mass of legal material could be admitted as exhibits." Pet. App. B13-B14.

ARGUMENT

1. Petitioner contends (Pet. 14-28) that the district court erred in excluding legal materials on which he claims to have relied (Pet. 15-18) and in declining to allow him to testify about the connection of those materials to his claimed belief in the legality of his actions (Pet. 18-19). These contentions are meritless.[1]

The courts of appeals have long held that a trial court has considerable discretion to exclude legal materials upon which a defendant supposedly relied because of their enormous potential to confuse the jury and because their alleged effect on a defendant's beliefs can be conveyed through his testimony. *United States* v. *Bergman*, 813 F.2d 1027, 1029-1030 (9th Cir.), cert. denied, 484 U.S. 852 (1987); *United States* v. *Malquist*, 791 F.2d 1399, 1402 (9th Cir.), cert. denied, 479 U.S. 954 (1986). See also *United States* v. *Mueller*, 778 F.2d 539, 540 (9th Cir. 1985) (characterizing defendant's claim that he should have been entitled to read legal materials to the jury as "frivolous"); *United States* v. *Mann*, 884 F.2d 532, 538 (10th Cir. 1989) (exclusion of cases and writings proper because they would confuse the jury about the law and because the defendant's testimony was more probative of his subjective beliefs than publications representing the source of those beliefs); *United*

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[1] Relying on *United States* v. *Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), cert. denied, 466 U.S. 980 (1984), petitioner also argues (Pet. 20) that the court's evidentiary rulings left the jury unable to consider the extent to which the law was uncertain. However, the court of appeals determined (Pet. App. A11) that the law was not uncertain, and petitioner has pointed to nothing suggesting that the court of appeals was incorrect in that regard.

States v. *Flitcraft*, 803 F.2d 184, 185-186 (5th Cir. 1986), cert. denied, 490 U.S. 1080 (1989); *United States* v. *Latham*, 754 F.2d 747, 751 (7th Cir. 1985); *United States* v. *Kraeger*, 711 F.2d 6, 7-8 (2d Cir. 1983); *United States* v. *Bernhardt*, 642 F.2d 251, 253 (8th Cir. 1981); *United States* v. *House*, 617 F. Supp. 232, 233 (W.D. Mich. 1985) (noting "enormous" potential for jury confusion), aff'd, 787 F.2d 593 (6th Cir. 1986).[2] It follows that a trial court may properly limit legal materials to the specific portions on which a defendant claims to have relied. Other portions plainly are irrelevant and inadmissible.

Here, as the court of appeals noted (Pet. App. A7-A9), petitioner never testified that he relied on specific parts of the excluded materials in deciding that his conduct was lawful. Hence, the evidence—"amorphous background materials which threaten[ed] to mislead the jury and cause confusion and delay" (*id.* at A8)—was properly excluded. See Fed. R. Evid. 403.

There is no merit to petitioner's assertion that *Cheek* v. *United States*, 111 S. Ct. 604 (1991), required admission of the excluded materials. Petitioner relies on an isolated passage in which the Court stated that "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." Pet. 26 (quoting 111 S. Ct. at 611). But nothing in *Cheek*, including the quoted passage, affects

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[2] See generally *Hamling* v. *United States*, 418 U.S. 87, 127 (1974) (a district court "retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative, and in requiring that which is to be brought to the jury's attention to be done so in a manner least likely to confuse that body"); Fed. R. Evid. 403.

the settled law regarding the admission of legal materials or suggests that irrelevant portions of such materials must be admitted. *Cheek* did not address those evidentiary issues. It instead involved the propriety of jury instructions on the substantive element of willfulness. The quoted passage concerning "evidence that might negate willfulness" related to those instructions, which required the jury to ignore the defendant's good-faith belief in the lawfulness of his conduct if that belief was not objectively reasonable. 111 S. Ct. at 608, 611. The holding of *Cheek* is merely that a defendant's good-faith belief negates willfulness, even if that belief is objectively unreasonable—"not that the trial judge must admit any and all evidence related to the basis of [that belief]." *United States* v. *Willie*, 941 F.2d 1384, 1395 (10th Cir. 1991), cert. denied, 112 S. Ct. 1200 (1992). Thus, *Cheek* did not alter existing law regarding the admissibility of legal materials. *Willie*, 941 F.2d at 1395.[3]

Nor is the decision below in conflict with *United States* v. *Harris*, 942 F.2d 1125 (7th Cir. 1991), as

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[3] See also *United States* v. *Malquist*, 791 F.2d at 1402 (correctly noting that good-faith belief is a "complete defense," while also upholding exclusion of legal materials upon which defendant supposedly relied); *United States* v. *Barnett*, 945 F.2d 1296, 1301 (5th Cir. 1991), cert. denied, 112 S. Ct. 1487 (1992) (post-*Cheek* case upholding exclusion of legal materials in accordance with prior circuit law and Fed. R. Evid. 403); *United States* v. *Fingado*, 934 F.2d 1163, 1165 n.1 (10th Cir.), cert. denied, 112 S. Ct. 320 (1991); *United States* v. *Hairston*, 819 F.2d 971, 973 (10th Cir. 1987) (court that excluded income tax literature upon which defendant ostensibly relied did "not prevent [defendant] from mounting a defense * * *, but rather exercised its discretion regarding the form in which such evidence should be admitted so as to minimize jury confusion").

petitioner contends (Pet. 27-28).[4] *Harris* did not involve the admissibility of legal materials, and it in no way suggests that a defendant must be allowed to introduce portions of such materials on which he does not specifically claim to have relied.[5]

Finally, contrary to petitioner's assertion (Pet. 18-19), he was not precluded from testifying about the substance of legal materials on which he claimed to have relied. See Tr. 1338-1339. Petitioner cites nothing in the record to support his assertion, and the court of appeals specifically found in its order denying rehearing that "the record does not support

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[4] Petitioner also asserts that the Ninth Circuit's ruling on this issus is inconsistent with its decision in *United States* v. *Powell*, 936 F.2d 1056 (1991), amended and superseded, 955 F.2d 1206 (1992). As petitioner concedes (Pet. 25), however, the *Powell* court found it unnecessary to reach this issue in its amended opinion; the alleged conflict with the original, superseded opinion is thus irrelevant. In any event, this Court ordinarily does not grant review to resolve an asserted intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[5] In *Harris*, the defendant was convicted of willfully failing to file tax returns and attempting to evade the income tax. The charges were based, in part, on her failure to report as income the value of jewelry she had received from a Mr. Kritzik, who was deceased at the time of trial. The defendant claimed the jewelry was a gift. The trial court excluded as hearsay letters written to the defendant by Kritzik. The Seventh Circuit held that the letters were not hearsay because they were not offered to prove the truth of any matters asserted therein. The court further found that the "critical nature" of the letters to Harris's defense precluded their exclusion under Fed. R. Evid. 403. 942 F.2d at 1130. The court pointed out that the letters could have caused Harris to believe that Kritzik loved her and intended the things he gave her to be gifts. Thus, in *Harris*, unlike in this case, the relevance of the excluded evidence was established.

[petitioner's] contention that the trial court forbad or limited his testimony regarding the legal materials." Pet. App. B13-B14.[6] Review of this factbound determination therefore is not warranted.

2. Petitioner also contends (Pet. 29-37) that the district court erred in declining to instruct the jury that it should consider his good-faith defense under a "subjective" standard. That objection is without merit.

In *Cheek*, the Court held only that it is error to instruct that a defendant's good-faith belief must be objectively reasonable to negate willfulness. The district court gave no such instruction here. It instructed (Tr. 1647 (Pet. 33-34)):

> Mr. Bash offered the defense of good-faith belief by Mr. Bash at the time involved of the lawfulness of the two programs which are the subject matter of this indictment, namely, that he believed in good faith that the charitable deduction church program described was lawful. He, also, believed in good faith that the investment tax credit, the master recording program offered, was lawful. If, in fact, you found that he did so believe, then that would be a defense. But I hasten to assure you that with respect to this issue of good-faith belief in the legality of the programs and good-faith reliance upon the advice of counsel, are spoken of as a defense but it

[6] Similarly, the court of appeals observed in its original opinion (Pet. App. A3 nn. 1, 2) that the district court allowed petitioner to testify about the two general tax treatises ("The Law of Tax Exempt Organizations" and "Nonprofit Corporations, Organizations and Associations") and the two cases (*Universal Life Church, Inc.* v. *United States*, 372 F. Supp. 770 (E.D. Cal. 1974), and *EMI North America Holdings, Inc.* v. *United States*, 675 F.2d 1068 (9th Cir. 1982)) that he cites.

> is not the burden of the defense to prove those issues. It is the burden of the government where the issue is raised to prove beyond a reasonable doubt that he did not have a good-faith belief in the programs * * *.

The court's use of the phrase "good-faith belief" made clear that the jury should apply a subjective standard, and its instruction neither stated nor implied the limitation, rejected in *Cheek*, that a good-faith belief must be objectively reasonable in order to negate willfulness. Rather, the jury was explicitly instructed that "[i]f, in fact, you found that he did so believe, then that would be a defense." Thus, the court properly directed the jury to focus its inquiry on petitioner's actual state of mind.[7]

3. Petitioner errs in contending (Pet. 37-43) that he was prosecuted for multiple felonies for the commission of a single act and that his convictions on Counts 3, 5, 55, 56, 58-62, and 64 therefore should be reversed. Petitioner was convicted on 63 counts of aiding, assisting, and advising the preparation and presentation of false individual income tax returns, in violation of 26 U.S.C. 7206(2). Counts 2 through

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[7] Petitioner asserts (Pet. 35-36) that the instruction violates the teaching of *Cheek* because the jurors were not specifically told to disregard their own personal feelings about the reasonableness of petitioner's claimed beliefs. But *Cheek* does not hold that a jury must be so instructed. Indeed, the Court recognized in *Cheek* that the reasonableness of a claimed belief is an appropriate consideration for the jury (111 S. Ct. at 611-612): "Of course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge."

51 were based on investment tax credits taxpayers claimed in relation to petitioner's master recording lease scheme; Counts 52 through 64 were based on charitable contributions taxpayers claimed in relation to petitioner's church scheme.

Contrary to petitioner's assertion (Pet. 37-38), he was not convicted of multiple felonies based on a "*single act* (participation in the formation of a church or participation in an entity that encouraged master recording lessees to take excessive investment tax credits)" that led to the filing of successive tax returns by individual taxpayers. Both schemes contemplated that each taxpayer involved would take unallowable deductions for more than one year. A separate offense was completed each time a taxpayer filed a false return based on the assistance or advice petitioner rendered, and petitioner was responsible for the filing of the false return as if he had filed it himself. *Habig* v. *United States*, 390 U.S. 222, 223 (1968); *Dennis* v. *United States*, 341 U.S. 494, 545 (1951) (Frankfurter, J., concurring); see also *United States* v. *Spudic*, 795 F.2d 1334, 1340 (7th Cir. 1986) (defendant convicted of both interstate transportation of a stolen motor vehicle and concealment of the same vehicle based on single act of changing the vehicle's identification number).

Furthermore, the record is replete with evidence that petitioner engaged in a continuing course of conduct and was extensively involved in the operations of both the church scheme and the master recording scheme. Gov't C.A. Br. 3-27. That course of conduct was designed to encourage taxpayers to file false returns for successive years.[8] Thus, it was not a single

[8] For example, petitioner recruited taxpayers and helped them to form their own "churches." He served as a minister

act, but numerous continuing acts that led to the multiple charges against petitioner.

Petitioner concedes that he can cite no authority in support of his novel argument, but urges the Court to consider, by analogy, *Mattingly* v. *United States*, 924 F.2d 785 (8th Cir. 1991). That case is of no help to petitioner. *Mattingly* construed 26 U.S.C. 6701(b)(3), which expressly limits the imposition of civil penalties for the promotion of abusive tax shelters. There is no similar limiting provision in 26 U.S.C. 7206(2).

4. Finally, petitioner argues (Pet. 43-47) that his actions leading to the formation of churches in 1980 were not sufficiently connected to the false tax returns filed for 1981 and subsequent years to support his convictions on Counts 52 through 64. That argument also has no merit.

Petitoner contends that there is no evidence that he discussed taxable income or deductions with anyone named in Counts 52 through 64 after 1980 and that the rapid development of tax law placed each taxpayer on notice that the availability of all deductions and exemptions should be reviewed by a competent tax advisor prior to filing a return. The government, however, was not required to prove that petitioner had personal contact with a taxpayer during a relevant tax year in order to establish a violation of Section 7206(2). It was sufficient for the government to introduce evidence from which the jury could infer that petitioner knew his scheme would result in the filing of false tax returns and deliberately proceeded

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of the mother Church of God, executed documents in that capacity to create new churches, and collected a $25 monthly fee from clients, which ostensibly ensured assistance if the validity of the church was challenged by the IRS.

with the scheme in the face of that knowledge. See, *e.g.*, *United States* v. *Gurary*, 860 F.2d 521, 524 (2d Cir. 1988), cert. denied, 490 U.S. 1035 (1989).

There was ample evidence that petitioner knew that his scheme would result in the filing of false returns for 1980 and subsequent years. He advised each client to set up his own franchise "church," to "donate" up to 50 percent of his gross income to that "church," to deposit the "donations" into a church bank account, and to use the account to pay personal nondeductible expenses. The clear implication of that advice was that the "church" would be used for tax avoidance over an extended period of time. Petitioner points to no evidence that clients were told that the advice pertained to only a single year.

Moreover, petitioner was responsible for post-1980 conduct that amounted to a reaffirmation of the legitimacy of the franchise "churches." During 1981, he delegated to co-conspirator James Brunner the collection of a $25 monthly fee to assist clients if the legality of their churches was ever questioned by the IRS. Petitioner also had Brunner contact "church" franchisees and conduct other activities to bring about more investments. Brunner testified that his activities for petitioner's "church" continued until February 1986. Gov't C.A. Br. 6, 10, 40.

Thus, both during and after 1980, petitioner engaged in, or was otherwise responsible for, conduct designed to encourage clients to claim false charitable deductions for 1980 and subsequent years. Accordingly, the evidence was sufficient to support his convictions on Counts 52 through 64.[9]

---

[9] We note that petitioner's sentence would not be affected even if he prevailed on this claim, since he was sentenced to concurrent five-year terms of probation on Counts 5 through 65.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45441

FILED
NOV 9 1992
OFFICE OF THE CLERK

No. 91-1535

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

JOHN BASH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I.

OPENING STATEMENT

In his Petition for Writ of Certiorari, Mr. Bash argued that the District Court erroneously excluded certain evidentiary materials and limited his ability to testify with

respect to those materials, leaving the jury unable to determine whether he had a good faith belief that his conduct with respect to the church program and master recording program was legal. Accordingly, Mr. Bash argued that the District Court committed prejudicial error and that his convictions should, therefore, be reversed.

Respondent argued that the evidence was properly excluded because Mr. Bash never testified that he relied on the excluded materials. Further, Respondent argued that Mr. Bash was not prevented from testifying about the substance of the materials. Respondent's statements are inaccurate and misleading. The

primary purpose of this reply is to demonstrate that Mr. Bash was limited in his ability to testify as to the substance of the excluded materials and his reliance thereon.

In his Petition for Writ of Certiorari, Mr. Bash argued that he has wrongfully been convicted of multiple felonies based upon a single act. Respondent has cited case law in support of its position that a single act can support multiple convictions. This reply will demonstrate how the case law cited by Respondent is inapplicable in the present circumstance and is misleading.

II.

EXCLUDED MATERIALS

The District Court's rulings on the admissibility of the Exhibits set forth in Petitioner's Writ of Certiorari, pp. 16-18, and Mr. Bash's testimony in response thereto, was as follows:

(1) Oleck: Non-Profit Corporation; Organization and Associations, (Prentice-Hall 1979); Hopkins: The Law of Tax-Exempt Organizations, (Exhibits 101-17 and 101-18, respectively).

With respect to these two texts, the District Court stated:

> "Well, I don't have any problems with your asking him did he read some books. I am a long way from allowing the books themselves to go in at this

> juncture. . . . I will say to you what I said at this juncture is, if you want to say did you consult some books and hold them up in the air, I won't prevent you from doing that, but having the books themselves go to the jury, I'm not prepared to rule that way at this moment." (R.T. 1338, 1339)

In accordance with the Court's Order, Mr. Bash identified both texts. He also testified that he went to the law library when considering the legality of the church program and that he purchased these texts because he was not permitted to take them out from the law library. Mr. Bash also testified that he made notations in the books when reviewing them. (R.T. 1366, 1367, attached hereto as Appendix pages A-1 through A-6, respectively)

After this testimony was provided, defense counsel stated, with respect to the texts, "If you will just set those aside, perhaps the Judge would want to look at those. I don't know." (R.T. 1367, attached hereto as Appendix A-4 through A-6) Defense counsel then began questioning Mr. Bash on a different matter. The suggestion is that either the Court indicated to defense counsel that no further questions would be permitted with respect to the texts, or alternatively, defense counsel, in an attempt to comply with Court's earlier ruling, believed that no further questions were permitted. Ultimately, the court ruled that the

texts could note be admitted into evidence. (R.T. 1545)

(2) Universal Life Church book (Exhibit 101-19).

With respect to this Exhibit, the court ruled that it could be admitted for identification purposes only. (R.T. 1344) Mr. Bash testified that he attended seminars regarding the church program and, in accordance with the court's order, stated that he received this Exhibit at one of the seminars. (R.T. 1362, 1363, attached hereto as Appendix pages A-7 through A-12) Once Mr. Bash identified Exhibit 101-19, defense also stated, "You can set that aside now, sir. The Judge would like you to hand it to him." The

Court responded by saying, "Thank you, sir." (R.T. 1363, attached hereto as Appendix pages A-10 through A-12) Defense counsel then proceeded to question Mr. Bash on a new matter. Again, it appears that the Court either indicated that no further questions would be permitted with respect to this exhibit or, alternatively, defense counsel, in order to comply with the Court's earlier ruling, stopped his questioning with respect this exhibit and moved on to a new matter. After Mr. Bash's testimony, Exhibit 101-19 was admitted into evidence with the exception of the decision in Universal Life Church, Inc. v. United States, 372 F.Supp. 770 (E.D. Cal.

I974), which Mr. Bash believed substantiated the legitimacy of the church program.

(3) Offering Material relating to the Audio Leasing Corporation Program (Exhibit 101-20).

With respect to this Exhibit, the Court stated that: "I will allow you to inquire of [Mr. Bash] if that is where he got it. I am not saying all or any part of it necessarily will come in." (R.T. 1345) In accordance with the Court's ruling, Mr. Bash testified that he received these materials at a seminar on master leasing. (R.T. 1390, attached hereto as Appendix pages A-13 through A-15) Defense counsel then stated, "If you would set that

aside, if I may approach the witness and remove this -- following the Cayman seminar, did you immediately become involved with the master recordings or master leasings?" (R.T. 1390, attached hereto as Appendix pages A-13 through A-15) Defense counsel's abrupt departure from questioning Mr. Bash with respect to the exhibit itself, again evidences that the Court must have indicated that after Mr. Bash identified the exhibit no further questions would be permitted or, alternatively, defense counsel was attempting to comply with the Court's earlier ruling and, therefore, did not ask any additional questions.

(4) American Marketing Company 1982 Master Recording Program and the American Marketing Sales Kit (Exhibits 101-22 and 101-23, respectively), both containing excerpts from the court's opinion in EMI North American Holdings, Inc. v. United States, 675 F.2d 1068 (9th Cir. 1982) ("EMI Opinion"), which indicated the cost of the master recording could entitle the owner to an investment tax credit. When discussing the admissibility of these Exhibits the Court instructed defense counsel that the materials could "not be read or given to the jury at least for the time being." As a result of the District Court's ruling, Mr. Bash was unable to testify from the

Exhibits. However, he did identify that they were all brochures of the American Marketing Company program. (R.T. 1404, attached hereto as Appendix pages A-16 through A-18) Specifically, with respect to Exhibit 101-23, Mr. Bash indicated that this was the book he used when making a presentation to a prospective master recording lessee and that this brochure had everything he thought was "pertinent about the program". (R.T. 1404, attached hereto as Appendix pages A-16 through A-18) After Mr. Bash completed his testimony, these Exhibits were admitted into evidence, however, without the EMI Opinion.

It is difficult to see how the jury could determine whether Mr. Bash was in good faith when it was not allowed to see what he relied upon or hear why he relied on it.

III.

MULTIPLE FELONIES -- SINGLE ACT

In his Petition for Writ of Certiorari, Mr. Bash indicated that he was erroneously convicted on multiple counts when his single act with respect to a particular taxpayer led the taxpayer to file successive erroneous tax returns. Respondent contests this position arguing that a single act can lead to multiple felonies.

In support of its position that a defendant can be convicted on multiple counts with respect to a single act, Respondent cites the case of United States v. Spudic, 795 F.2d 1334 (7th Cir. 1986), where the defendant was convicted of both interstate transportation of a stolen motor vehicle and concealment of the same vehicle based on a single act of changing the vehicle's identification number. In Spudic, the defendant was charged with two different crimes stemming from the same act. Mr. Bash, however, was convicted of the same offense, based on a single act. The Court in Spudic noted that multiple convictions based on a single act are appropriate where the

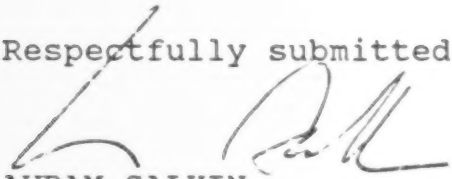
elements of each offense are different. In this instance, Mr. Bash has been convicted of the same crime on more than one count (i.e., the elements of each count are the same) based on a single act. Accordingly, for these reasons, United States v. Spudic, supra, does not support the position that Mr. Bash's single act of rendering advice could lead to multiple felonies.

IV.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and those set forth above, it is respectfully requested that Mr. Bash's Petition be allowed.

Respectfully submitted,



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APPENDIX

organization?

A. Yes. There were.

Q. Did you, aside from going to the -- you said you went to the county law library, right?

A. Right down the street.

Q. You are not yourself a lawyer?

A. No. I am not.

Q. Were you allowed access to the materials in the law library?

A. Yes.

Q. Did you check materials out?

A. I tried to check materials out. They told me I couldn't because

(R.T. 1366 Continued)

I wasn't an attorney, unless I posted a sum of money with them as a deposit. They gave me a non-lawyer library card.

Q. So you actually got a card from the law library?

A. I still have it.

MR. WILLIAMSON: If I may have the clerk place these on the witness stand, Your Honor. 101-17 and 101-18. Did you yourself, obtain other than by checking out the library, any other resource material that you looked at as part of your research in this issue?

A. These two books.

Q. Now, you have before you what has been marked, if you will

(R.T. 1366 Continued)

tell me, sir, 101-17 and 18; is that right?

A. Yes.

Q. For identification. Those two books are books which you purchased yourself?

A. Yes. I purchased these books myself.

Q. In fact, you do, either one or both of these books have notations in them placed there by you when you were reviewing them?

A. Yes.

Q. Which one are you looking at presently?

A. The Law of Tax Exempt Organizations.

Q. And how about the other book? By the way, what exhibit

(R.T. 1367 Continued)

number is The Law of Tax Exempt Organizations?

A. 101-18.

Q. And the other exhibit, 101-17, is entitled what, sir?

A. Nonprofit Corporations, Organizations and Associations.

Q. If you would just set those aside, perhaps the Judge would want to look at those. I don't know.

Eventually, did you take steps to put together a church organization?

A. Yes. I did.

Q. Did you do that by yourself or with anyone else?

A. Initially, it was with Greg Moeller and Tom Benzing.

(R.T. 1367 Continued)

Q. Did Mr. Moeller at some point set out of the

Q. And specifically, did you attend any other seminars or programs on the same subject?

A. Yes. I did attend other seminars.

Q. Can you tell us very generally what program you attended, or programs and where they were?

A. I attended at least two other programs of the Drexler organization which was Freedom Foundation. They were located up off of University Avenue. I think it was around Fairmont in the University areas, somewhere up in that region. I don't recollect if I drove by -- if I drove by, I would be able to point it out.

(R.T. 1362 Continued)

Q. Did you attend any programs outside of the San Diego area?

A. Yes. I did.

Q. Where was that?

A. Mr. Moeller had heard about a seminar that was going to be held in the Santa Ana area from a company or group called the Universal Life Church.

Q. Did you attend that program?

A. Yes. I did.

Q. And about when was that? Are we still in the early part of 1980?

A. Yes.

(R.T. 1362 Continued)

MR. WILLIAMSON: Your Honor, I ask the Court to present to the witness what has been marked for identification

101-19. I will not be at this time moving this into evidence.

Now, Mr. Bash, if you would look at what has been marked 101-19 and simply identify what that is or it appears to be?

A. This is a copy of the handouts that they gave to me at the meeting of this Universal Life Church.

Q. Is this the one that you attended with Mr. Moeller?

A. Yes.

Q. You can set that aside now, sir. The Judge would like you to hand it to him.

THE COURT: Thank you, sir.

(R.T. 1363 Continued)

Q. I take it you took some materials away from that program with you?

A. Yes. I also had an audio tape. I took a personal tape recorder and taped the presentation.

Q. Either after or before, around the same time as you were going to these various programs on the church issue; did you do anything else independently to look into the question of this type of program?

A. Yes. I did.

Q. Can you tell the ladies and gentlemen some of the steps that you took?

(R.T. 1363 Continued)

A. Well, I went to the San Diego law library and pulled some books out on nonprofit organizations to see what the legalities were. I also went to look to see, if I remember

Mr. Bash, I ask you to look at what has been marked for identification 101-20 and without discussing it or describing the contents of that, does that appear to be some materials that you received at the Grand Caymans or a Grand Cayman seminar on master leasing?

A. Yes.

Q. If you would set that aside, if I may approach the witness and remove this -- following the Cayman seminar, did you immediately become involved with master recordings or master leasings?

A. No.

(R.T. 1390 Continued)

Q. You were, however, involved with these oil and gas ventures that we heard about?

A. Yes.

Q. And was it about the same time, late eighties, maybe '81, at that point, that you also, got involved in the real estate ventures that we have heard Mr. Novack talk about?

A. What time frame?

Q. After the end of 1980 and the beginning of '81? It was after that?

A. Yes. It was after that.

Q. About when was your involvement with those programs?

(R.T. 1390 Continued)

A. The real estate programs, as I recall, we started looking into it in late '81 and got one together in early '82.

Q. On the subject of the oil and gas program --

A. Yes. I recognize them.

Q. Very generally, all three of those are brochures in some form or another for the AMC program; is that right, sir?

A. Yes.

Q. And the first of these three bearing number 101-21, is it?

A. The first?

Q. Yes.

A. This was the original brochure.

Q. That was for what year, sir?

A. 1981.

Q. The next one, 101-22, would have been for what year, sir?

(R.T. 1404 Continued)

A. This I believe, '82, it could have been '83, but I believe '82.

Q. And that contains materials in addition to that which we have an exhibit a tape and record?

A. Yes. There was a sample put in, so the prospective people could listen and see what it sounded like.

Q. Finally, 101-23.

A. This was my personal book that I used when I made presentations to people to buy. I had all of the things in here that I thought were pertinent about the program, attorney letter, the lease itself, the production company, things about Mr.

(R.T. 1404 Continued)

Gallo, the Troubadour Recording brochure, Troubadour